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**Asset Acceptance, LLC, Plaintiff/Appellee vs. Edison Guimaraes,
an Individual, Defendant/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

ASSET ACCEPTANCE, LLC,

Plaintiff – Appellee,

vs.

EDISON GUIMARAES, an individual,

Defendant – Appellant.

APPELLANT'S BRIEF IN CHIEF

Appeal from final judgment of the Second Judicial District Court, Farmington
Department, Davis County, State of Utah, the Honorable David Connors,
presiding.

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JURISDICTION OF THE APPELLATE COURT

The Utah Court Of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2) (h). The order appealed from is a final order disposing of all claims of all parties.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

STANDARD OF REVIEW

Since a summary judgment is granted as a matter of law rather than fact, the appellate court reviews the trial court's conclusions for correctness and to determine whether there has been an error of law, without according deference to the trial court's legal Conclusions. Barber v. Farmers Ins. Exch. 751 P.2d 248 (Utah Ct App. 1988); Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

ISSUES

- I. Whether the plaintiff's motion for summary judgment is premature and failed to show that the plaintiff was entitled to summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991). When reviewing the facts supporting the order, we view them in a light most favorable to the party opposing the motion. Baldwin v. Burton, 850 P.2d 1188, 1192 (Utah 1993). "On appeal from summary judgment, we accord the trial court's legal conclusions no deference but review them for correctness." Malone v. Parker, 826 P.2d 132, 133 (Utah 1992).
- II. Whether the plaintiff's complaint should be dismissed based on the equitable doctrine of laches. "In order to prove the affirmative

defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by that delay " Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir.), *cert. denied*, 522 U.S. 914, 118 S.Ct. 298, 139 L.Ed.2d 230 (1997). "We apply de novo review in this case." Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir.), *cert. denied*, 522 U.S. 914, 118 S.Ct. 298, 139 L.Ed.2d 230 (1997).

- III. Whether the trial court erred by entering judgment without a trial or hearing. Court must grant request for hearing on summary judgment motion unless it finds (a) that the motion or opposition is "frivolous" or (b) that the issue "has been authoritatively decided." Utah Rules of Civil Procedure 7(e). "[T]his court generally reviews interpretations of rules for correctness." In re Fox, 2004 UT 20, ¶ 5, 89 P.3d 127.
- IV. Whether the trial court erred by failing to make findings of fact and conclusions of law. "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A." Utah Rules of Civil Procedure 52. "[T]his court generally reviews interpretations of rules for correctness." In re Fox, 2004 UT 20, ¶ 5, 89 P.3d 127.
- V. Whether the trial court erred in denying the defendant's motion for continuance. "The court may postpone a trial for good cause upon such terms as are just." Utah Rules of Civil Procedure 40. Whether the trial court properly denied a motion to continue is reviewed for abuse of discretion. In re V.L., 2008 UT App 88, 182 P.3d 395.

DETERMINATIVE AUTHORITY

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991). When reviewing the facts supporting the order, we view them in a light most favorable to the party opposing the motion. Baldwin v. Burton, 850 P.2d 1188, 1192 (Utah 1993).

"In order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by that delay " Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir.), *cert. denied*, 522 U.S. 914, 118 S.Ct. 298, 139 L.Ed.2d 230 (1997).

Court must grant request for hearing on summary judgment motion unless it finds (a) that the motion or opposition is "frivolous" or (b) that the issue "has been authoritatively decided." Utah Rules of Civil Procedure 7(e).

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A." Utah Rules of Civil Procedure 52.

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff is a bill collector that filed a collection complaint on October 2, 2012. The defendant filed his answer on November 5, 2012. Plaintiff then submitted his request for default and did not inform the Court that an answer had been filed and served on plaintiff's attorney more than a week before. As a result, the Court entered default on November 13, 2012. The Court, upon subsequently discovering what plaintiff's attorney had done, vacated the default judgment on November 26, 2012.

Plaintiff's attorney then did absolutely nothing for a full year and the trial court on November 15, 2013 entered its Notice of Intent to Dismiss based on the failure of the plaintiff's attorney to diligently prosecute the case. Apparently rejuvenated by the immediate threat of impending dismissal, plaintiff's attorney on

November 25, 2013, filed his request for final pre-trial conference and request for trial setting. Plaintiff's attorney followed this up by filing his request for judgment on the pleadings and motion for summary judgment. Defendant filed his address change with the court and gave notice to plaintiff's attorney of the address change on January 9, 2014. Neither the plaintiff's request for pre-trial conference nor the request for judgment on the pleadings/motion for summary judgment were served on the defendant when they were filed (perhaps because the plaintiff's attorney sent them to the wrong address.) Defendant requested both a continuance of the status conference (based on his failure to receive notice of the status conference) and filed a response to the plaintiff's motion for judgment on the pleadings/motion for summary judgment on January 13, 2014.

Four days later, on January 17, 2014, the trial court (in a one word scrawled statement written across the motion for continuance) denied the defendant's motion for continuance and held a status conference on the spot. On February 11, 2014, plaintiff's attorney filed his notice to submit the case for decision. Eight days later, on February 19, 2014, the defendant filed his response objecting to the plaintiff's request to submit the case for decision, only to find out that the trial court had filed its judgment against the defendant on February 13, 2014, a mere two days after the plaintiff's attorney had filed his notice to submit the case for decision. Defendant timely submitted his notice of appeal.

SUMMARY OF THE ARGUMENT.

Any fair reading of this case demonstrates that the record memorializes a rush to judgment. Plaintiff's counsel first attempted to deceive the trial court by denying that defendant had filed an answer to the plaintiff's complaint, and then, when the trial court vacated that default judgment, the plaintiff pressed the trial court to make a premature determination on a motion for summary judgment that had no foundation. The error of the trial court in failing to grant a continuance, in failing to grant a hearing, and in filing to make findings of fact or conclusions of law, only compounded the error of the trial court in granting unwarranted summary judgment.

PROPOSITION ONE:

**THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE
AND FAILED TO SHOW THAT THE PLAINTIFF WAS ENTITLED TO
SUMMARY JUDGMENT.**

To evaluate and determine the error in this case, the Utah Court of Appeals does not have to look any further than the moving papers that were before the Court at the time it rendered summary judgment, namely, plaintiff's motion, defendant's response to that motion, and the plaintiff's reply. Plaintiff's motion for summary judgment is as deficient as it is premature. To sustain summary disposition, the Court must find that there is no substantial issue of material

fact and that the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993); Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991). Any doubt must be resolved in favor of the party opposing the motion. When reviewing the facts supporting the order, we view them in a light most favorable to the party opposing the motion. Baldwin v. Burton, 850 P.2d 1188, 1192 (Utah 1993). “On appeal from summary judgment legal conclusions no deference but review them for correctness.” Malone v. Parker, 826 P.2d 132, 133 (Utah 1992).

When viewed from this perspective, the plaintiff did nothing but restate the same unsworn allegations that were made in plaintiff’s original complaint. The only difference between the complaint and the motion for summary judgment was that the motion for summary judgment attached an affidavit from one “L.Gillette” that is essentially nothing more than inadmissible hearsay from an anonymous source. The affiant is not identified and plaintiff’s counsel made no attempt to ground the affidavit on the business record exception to the hearsay rule. Defendant filed a timely objection and response to the plaintiff’s motion for summary judgment and specifically pointed out several disputed facts that would preclude summary disposition.

Despite defendant's objections, the trial court peremptorily granted summary judgment. At the time summary judgment was granted, the following issues remained:

- 1) Whether the subject account was assigned to the plaintiff collection agency. (The plaintiff never furnished a copy of the assignment or any other proof of standing to bring this lawsuit in the first place.);
- 2) Whether goods and services were provided to defendant by plaintiff or plaintiff's predecessor in interest;
- 3) Whether defendant owes plaintiff any money for goods and services received;
- 4) Whether defendant paid any of the amount said to be owed.

To establish these disputed issues, plaintiff relies solely on the collection agency's attorney's self-serving conclusions and an insufficient and inadmissible affidavit from what amounts to an anonymous source. The trial court erred when it granted summary judgment on this state of the record.

PROPOSITION TWO:

**THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BASED ON THE
EQUITABLE DOCTRINE OF LACHES.**

Where the plaintiff has unreasonably delayed asserting a claim, and where the defendant was prejudiced in his ability to defend because of that delay, the common law defense of laches will work to equitably preclude summary disposition. Plaintiff filed this collection case on October 2, 2012. Defendant filed his answer and plaintiff did nothing for more than a year at which time the

trial court gave notice of intent to dismiss for failure to prosecute.¹ After being chastised by the trial court, plaintiff's attorney immediately moved for a trial setting and pre-trial conference.

As described above, the trial court then held a conference and entered its order for summary judgment behind closed doors several days later. The unreasonable delay caused by the plaintiff precluded the defendant's ability to defend himself, and specifically interfered with defendant's ability to understand the nature and basis of the allegations against him. However, this issue was never considered by the trial court because of its brash action in prematurely granting summary judgment.

PROPOSITION THREE:

THE TRIAL COURT ERRED BY ENTERING JUDGMENT WITHOUT A TRIAL OR HEARING.

As described above, there was never a hearing on plaintiff's motion for summary judgment.

"Court must grant request for hearing on summary judgment motion unless it finds (a) that the motion or opposition is "frivolous" or (b) that the issue "has been authoritatively decided"." Utah Rules of Civil Procedure 7(e).

¹ Actually, the plaintiff's attorney did file a motion for default that falsely represented that the defendant had not filed an answer to the complaint. The trial court ultimately vacated the plaintiff's default judgment after discovering the plaintiff's deception.

Has the “issue been authoritatively decided”? Hardly. What is apparent from the record is just the opposite. What is “authoritatively” apparent is that the trial court summarily disposed of this case on the basis of “authority” that was not authority at all, but merely nothing more than inadmissible hearsay from an anonymous source. Had the trial court held a hearing on this matter, perhaps the trial court would have realized the deficient nature of plaintiff’s motion.

The statute provides for a hearing and a hearing was not granted. This is error requiring the judgment to be vacated.

PROPOSITION FOUR

THE TRIAL COURT ERRED BY FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In granting summary judgment, the trial court made no findings of fact or conclusions of law.

“In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A.” Utah Rules of Civil Procedure 52.

Had the trial court taken the time to explain the basis of its ruling, this appear would not have been necessary because there was no basis for summary judgment.

PROPOSITION FIVE:

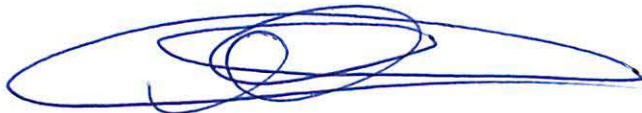
THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S MOTION FOR CONTINUANCE.

When the defendant realized that the case had been set for a pre-trial conference, discovery had not been initiated or completed, and, for all practical purposes, nothing had occurred in the case for nearly two years. On the other hand, the plaintiff continued its efforts to facilitate the trial court's rush to judgment.

Defendant filed his motion for continuance that was ignored by the trial court. Instead, the court held the pre-trial conference (without discussing the plaintiff's pending motion for summary judgment) and the trial court judge then retreated to the solitude of chambers where summary judgment was entered without a hearing or further explanation.

This indeed constituted a rush to judgment.

WHEREFORE, the defendant – appellant Edison Guimaraes prays that this Court reverse and vacate the summary judgment entered by the trial court and remand with instructions to dismiss. Defendant – appellant also requests an award of costs be entered against plaintiff in favor of appellant, and for such other relief as the Court may deem just and equitable.



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CERTIFICATE OF SERVICE

I certify that a copy of the attached Appellant's Brief in Chief was served upon the party listed below by mailing it by first class mail to the following address:

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